No. 11400

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TITUS CORBETT, MARTHA WOODS CORBETT and LOTTIE FRANK, Administratrix of the Estate of Levi Frank, Deceased,
Appellants,

vs.

JOHN C. WILKERSON, *Appellee.*

BRIEF OF APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

NAT. U. BROWN
KENNETH C. HAWKINS
BROWN & HAWKINS
Post Office Address:
Box 437
Office Address:
626 Miller Building
Yakima, Washington
Attorneys for Appellee

REPUBLIC PUBLISHING COMPANY, YAKIMA, WASH.

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Attorneys for Appellee

STATEMENT OF CASE

This is a law case tried to the court sitting without a jury which resulted in Findings of Fact, Conclusions of Law and Judgment in favor of the appellee. It is to be noticed that in the Specifications of Error of the Appellants no error is assigned relative to any rulings of the trial court made in the course of trial and the only question therefor is the sufficiency of the evidence to justify the judgment entered. For that reason it becomes the duty of this court to accept the evidence most favorable to the appellee.

Smith vs. Porter, 143 F. 2d, 292.

The trial court was justified, not only by reason of the above rule but also because, of the preponderance of the evidence in this case, to find that the facts concerning the accident were as follows: The Appellee, John C. Wilkerson, and his wife, accompanied by Mr. and Mrs. R. C. Chittester and Mr. and Mrs. Robert Monahan, on the evening of September 8, 1945, had been to The Dalles, Oregon, where they had been out to a small restaurant and dance hall and had been served a supper and had danced for sometime. (R. 195) They crossed the Columbia River by ferry at The Dalles a little after twelve and were driving toward Wishram, Washington, their home. At about one a. m. at a point about twenty-eight miles west of Goldendale in the State of Washington on public highway No. 830, Wilkerson, as he came over the brow of a hill, saw a rather bright light ahead. He was on a slight down-grade and slowed

down a little. (R. 195) The bright light was apparently coming from a car parked on the right side of the road headed south, in other words, facing Mr. Wilkerson. As he got beyond the lights of the parked car he noticed three people near the middle of the road who were rather close together and appeared to be carrying or supporting or holding someone. (R. 195) He immediately turned his car to the left and applied his brakes. He was unable to stop instantly and the persons on the road were struck by the side of the right front fender. (R. 196) It developed that the persons who were struck were Martha Woods Corbett, one of the plaintiffs, who was rather severely injured, and Levi Frank, who was killed by the accident.

Just prior to the time that Wilkerson first saw the people he was traveling well within the legal speed limit on his right side of the road and was in no wise violating any law of the road or any statutes of the State. The court was also entitled to believe that the persons who were struck by the car were close to the center of the road at the time the accident occurred.

While it is true that the occupants of the Appellants' car all testified that the persons struck were on the right shoulder of the road, yet, as pointed out above, the court was entitled to believe otherwise, not only from the evidence of the Appellee and those in his car but from evidence of Robert W. Merrill (R. 125 et seq.) and Gordon E. Hyland (R. 104), state highway patrolman.

The court's opinion (R. 226 et seq.), delivered immediately upon the close of argument, analyzes the testimony as well as

we could and points out why he found that the Appellee was wholly without negligence and that the occupants of the other car were violating the statute law of the state in walking on the paved portion of the highway and failing to step off at the approach of an oncoming car.

THE STATE LAW

The applicable law of the State of Washington, Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington provides as follows:

> "Pedestrians on any public highway where a sidewalk is provided shall proceed upon such sidewalk. Pedestrians on any public highway where no sidewalk is provided shall proceed on the extreme left-hand side of the roadway and upon meeting an on-coming vehicle shall step to their left and clear of the roadway."

This section has been construed by our Supreme Court in the case of *Nylund vs. Johnston*, 19 Wash. 2d., 163.

Even, therefore, were the Appellee guilty of negligence, this violation of the statute law rendered the deceased person and the defendant Corbett guilty of contributory negligence so as to bar their recovery.

FUNCTION OF THIS COURT

This case is one for the application of Rule No. 52 of the Federal Rules of Procedure, 28 U. S. C. A. following Sec. 723C, which provides:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

Inasmuch as the decision in this case resolved itself wholly into the determination of the credibility of the witnesses, the findings of the trial court must therefore stand.

There have been numerous decisions involving the application of Rule 52 from every Circuit but we shall confine this brief to calling the court's attention to a few of those from this court.

In *Wingate vs. Bercut, et al,* 146 F. 2d, 725, 728, the court said, with reference to a question of fact passed on by the trial judge:

> "Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, directs that a trial court's findings of fact be accepted unless 'clearly erroneous.' In the instant case the oft-quoted rule stated in *Silver King Coalition Mines Co. vs. Silver King Consol. Min. Co.,* 8 Cir., 204 F. 166, 177, Ann. Cas. 1918B, 571, is applicable: '* * * where a court has considered conflicting evidence, and made a finding or decree, it is presumptively correct, and unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand.' "

In *Hartford Accident & Indemnity Co. vs. Jasper, et al,* 144 F. 2d, 266, 267, this court adhered to the rule saying:

> "Where there is a conflict in the evidence the findings of the trial court are presumptively correct and should not be disturbed unless clearly erroneous. The findings of facts are to be accepted as true and the sufficiency of the evidence

> to sustain the finding remains the only consideration of the appellate court. This court has held that the rule is well settled that an appellate court will not disturb findings of the trial court based on conflicting evidence taken in open court except for clear error."

Earlier, in *Western Union Telegraph Co. vs. Bromberg*, 143 F. 2d 288, 290, where the question as to the weight to be given the trial court's findings was considered, the court therein pointed out that Rule 52 was but a restatement of a well established principle, saying:

> "The rule does not disturb the long followed principle that the judge or jury which has seen and heard the witnesses is better qualified to weigh their testimony than is a reviewing tribunal and that findings of fact of the trial body will not be set aside unless clearly erroneous."

We could continue this brief almost indefinitely with citations of similar authority but will not do so except to point out that among numerous other cases in which this court had had occasion to consider Rule 52 and reached the same conclusion that it has in the cases from which we have quoted are:

Clark Bros. Co. vs. Portex Oil Co., 113 F. 2d, 45.

Occidental Life Ins. Co. vs. Thomas, 107 F. 2d, 876.

Augustine vs. Bowles, 149 F. 2d, 93.

Gates vs. General Casualty Co., 120 F. 2d, 925.

Sapp vs. Gardner, 143 F. 2d, 423.

O'Keith vs. Johnston, 129 F. 2d, 889.

The function of this court, therefore, on appeals of this kind being limited by the rule and this court's own construction of the rule, which is the precise construction placed upon it by the other nine Circuits, an affirmance of this case necessarily follows.

CONCLUSION

The decision of Judge Driver was not only eminently correct but was the only conclusion that any Judge could reach in considering the evidence in this case and therefore should be affirmed.

Respectfully submitted,

NAT. U. BROWN
KENNETH C. HAWKINS
BROWN & HAWKINS

Post Office Address:
Box 437

Office Address:
626 Miller Building
Yakima, Washington

Attorneys for Appellee